No. 99-96 JUL 6 1999

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In The

Supreme Court of the United States

October Term, 1998

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 324, AFL-CIO, CLC,

Defendant-Petitioner,

-against-

K.V. MART COMPANY d/b/a TOP VALU MARKETS and VALU PLUS FOOD WAREHOUSES, a corporation; and MARKET VENTURE, LLC,

Plaintiffs-Respondents.

PETITION (WITH APPENDIX) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. When Congress enacted Section 301(b) of the Labor Management Relations Act, 1947 ("LMRA"), 29 U.S.C. § 185(b), which provides that any "labor organization" which represents employees in an industry affecting commerce "may sue or be sued as an entity . . . in the courts of the United States," did it confer federal jurisdiction over all actions by or against such a labor organization, including purely state law claims, or did it limit federal jurisdiction only to claims by or against such a labor organization which arise under or are preempted by Section 301(a) of the LMRA?

2. If Congress did confer federal jurisdiction over all actions by or against such a labor organization, including purely state law claims, are there any circumstances under which such a grant of federal jurisdiction would be constitutional?

PARTIES BELOW

The parties named in the caption herein are all the parties in the Court of Appeals and in the District Court. Petitioner's name in the courts below was incorrectly stated; it has been corrected in the caption of this petition. Although the captions in both courts below bore the names of up to fifty "Doe" defendants, no Doe defendant was ever identified or served below.

Petitioner is not a corporation, but it does have a "parent" body, the United Food and Commercial Workers International Union, AFL-CIO, CLC

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In The

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October Term, 1998

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 324, AFL-CIO, CLC,

Defendant-Petitioner,

-against-

K.V. MART COMPANY d/b/a TOP VALU MARKETS and VALU PLUS FOOD WAREHOUSES, a corporation; and MARKET VENTURE, LLC,

Plaintiffs-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner United Food and Commercial Workers Union, Local No. 324, AFL-CIO, CLC respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in *K.V. Mart Co. dba Top Valu Markets and Valu Plus Food Warehouses, a corporation; and Market Venture, LLC, v. United Food and Commercial Workers International Union, Local 324, Does 1 through 50, inclusive,* ___ F.3d ___, 161 L.R.R.M. (BNA) 2001 (9th Cir. 1999).

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California ("District Court") is unreported, but is reproduced in the Appendix, *infra* at A-10. The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") is reported at 161 L.R.R.M. (BNA) 2001 (9th Cir. 1999), and is reproduced in the Appendix at A-1.[1]

JURISDICTION

The Ninth Circuit rendered its opinion and order affirming the final order of the District Court on April 14, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the construction of Section 301(b) of the Labor Management Relations Act, 1947 ("Section 301(b)"), 29 U.S.C. § 185(b). The entire text of Section 301 is reproduced in the Appendix at A-19.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action by an employer and a property owner against a labor organization for its activities allegedly occurring during a labor dispute. The action was originally filed in the Superior Court of the State of California and alleged only state law

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[1] At the time this petition was sent to the printer, the Ninth Circuit's opinion had not been officially reported.

claims for relief. ER 4-10.[2]

Specifically, plaintiffs-respondents K.V. Mart Company d/b/a Top Valu Markets and Valu Plus Food Warehouses ("K.V. Mart") and Market Venture, LLC ("Market Venture") (collectively, "Respondents") sought damages and *extremely broad* injunctive relief for acts allegedly cor mitted by one or more agents of defendant-petitioner United Food and Commercial Workers Union, Local No. 324, AFL-CIO, CLC ("Local 324") during the course of picketing and leafleting at one of K.V. Mart's stores. In the complaint and in declarations supporting their application for temporary and preliminary relief, Respondents alleged that since the "grand opening" of K.V. Mart's Valu Plus store in Lynwood, California on December 6, 1996, Local 324 had engaged in "mass picketing," "yelling and screaming" and other *allegedly* illegal acts at the store. ER 5-6.[3] For this alleged activity, Respondents sought an *extremely broad* temporary restraining order and preliminary injunction that would have enjoined virtually all picketing and other free speech activities of Local 324 and its members within a 150-yard radius of the Lynwood store. ER 9.

Before any hearing in state court on Respondents' application for a temporary restraining order, Local 324 removed the action to the District Court. The District Court's jurisdiction, Local 324 contended, lay in the "sue or be sued" language of Section 301(b), which, when combined with the general reference in the

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[2] The Excerpts of Record in the Ninth Circuit is referred to as "ER __."

[3] Although the complaint alleged that Local 324's pickets were essentially rowdy and "disrupt[ed] the business operations at the LYNWOOD STORE," it does *not* allege any violence on the part of any picketer.

statute to the "courts of the United States," confers federal jurisdiction over all actions (including purely state law claims) by or against a labor organization representing employees in an industry affecting commerce. *American National Red Cross v. S.G. and A.E.*, 505 U.S. 247 (1992).[4]

On its own motion (by order to show cause, ER 13), the District Court remanded the case to state court, holding that "the Court does not have subject-matter jurisdiction" and that "[t]his case never belonged in the federal court." Appendix at A-15-16. The District Court also awarded Respondents "$1,443.75 in reasonable attorney's fees as a result of defendant's improper removal" Pursuant to 28 U.S.C. § 1447(c). Appendix at A-17.

B. Statement of the Facts

Although Local 324 vigorously denies the underlying allegations of illegal activities in this case, the essential facts related to its removal (and thus to its remand and the award of attorney's fees) are not in dispute. K.V. Mart is a California corporation operating several retail food stores, including one in Lynwood, California. ER 4-5 (¶¶ 1 and 6). Market Venture is the owner of the real property upon which K.V. Mart's Lynwood store is located. ER 5 (¶ 2). Local 324 is a "labor organization" which represents employees in the retail food industry, "an industry affecting commerce." ER 5 (¶ 3).

Local 324 and K.V. Mart are not parties to a collective bargaining agreement. Indeed, precisely because K.V. Mart does not pay "union" wages and benefits pursuant to a collective

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[4] Like the Red Cross in the cited decision, Local 324 has never contended that any of Respondents' state-law claims have been preempted by federal law.

bargaining agreement, and thus unfairly competes with retail food stores that do, Local 324 launched a lawful consumer boycott of K.V. Mart, which included the picketing and leafleting of all of K.V. Mart's stores, including its Lynwood store.

As part of its effort to lawfully inform "the public (including consumers) that [K.V. Mart] does not employ members of, or have a contract with," Local 324, *see* 29 U.S.C. § 158(b)(7)(c), and that K.V. Mart pays substandard wages and benefits to its employees, Local 324 had picketed and leafleted at K.V. Mart's Lynwood store since it opened. ER 5 (¶ 7). Local 324 vigorously denies that it or any of its agents engaged in any unlawful conduct during the course of its picketing and leafleting. ER 31.

K.V. Mart initiated a series of six actions in state court primarily seeking to greatly limit Local 324's picketing and leafleting activities.[5] The complaint in the action at issue here sought to prohibit Local 324 from engaging in even peaceful picketing closer than the length of one and one-half football fields to its Lynwood store, and to otherwise infringe upon Local 324's free speech and other federally protected rights. After being informed that K.V. Mart (and its landlord) would be seeking to obtain such an overly restrictive temporary restraining order, Local 324 removed the case to the district court before the hearing on Respondents' application for a temporary restraining order and before Local 324 was even served with the summons and complaint. ER 1.

Following the removal, the District Court promptly issued an order directing Local 324 to show cause why the action should not be remanded. ER 13. Following full briefing by the parties, but

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[5] Each action was limited to seeking broad injunctive relief at a single store operated by K.V. Mart.

without oral argument, the District Court remanded the case to state court, holding that "the Court does not have subject-matter jurisdiction" and that "[t]his case never belonged in the federal court." Appendix at A-15-16. The District Court then awarded Respondents "$1,443.75 in reasonable attorney's fees as a result of defendant's improper removal." Appendix at A-17.

As a final factual note, and as noted above, this action was but one of a series of six actions brought by K.V. Mart against Local 324 for alleged illegal conduct occurring during the course of picketing at its stores. Indeed, this was the third action between K.V. Mart and Local 324 that Local 324 removed to federal court (out of the six that had been filed). As Local 324 promptly informed the District Court, both prior removed actions were remanded to state court (but without an order awarding attorney's fees). *See K.V. Mart Company d/b/a Valu Plus Food Warehouse v. UFCW Local 324,* CV 95-6482-WJR (VAPx); and *K.V. Mart Company d/b/a Top Valu v. UFCW Local 324,* CV 96-1883-GHK (Shx).[6]

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[6] Local 324 is not in the habit of beating dead horses. However, there are only two ways for a defendant like Local 324 to obtain some appellate review of remand orders: keep removing "the same or similar" cases in the hope of obtaining at least one "district court decision denying a motion to remand" (which is then reviewable on appeal), *Krangel v. General Dynamics Corp.*, 968 F.2d 914, 916 (9th Cir. 1992), or be sanctioned (where "some evaluation of the merits of the remand order is necessary to review an award of attorney's fees," *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992)). Although Local 324 had hoped for the former, it has settled for the latter.

C. Proceedings in the Ninth Circuit

Pursuant to 28 U.S.C. § 1447(d), the District Court's remand order was not "reviewable on appeal or otherwise." *See Krangel v. General Dynamics Corp.*, 968 F.2d 914, 916 (9th Cir. 1992); *Schmitt v. Insurance Company of North America*, 845 F.2d 1546, 1549 (9th Cir. 1988). In the same order, however, the District Court also awarded Respondents "$1,443.75 in reasonable attorney's fees as a result of defendant's improper removal" pursuant to 28 U.S.C. § 1447(c). Appendix at A-17. This portion of the order was reviewable on appeal, and "some evaluation of the merits of the remand order is necessary to review an award of attorney's fees." *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). It is from this portion of the order that Local 324 appealed to the Ninth Circuit.

In its appeal, Local 324 did not raise any technical or due process issues surrounding the District Court's award of attorney's fees.[7] Rather, Local 324 challenged the award solely from the perspective that "some evaluation of the merits of the remand order is necessary to review an award of attorney's fees." *Moore*, 981 F.2d at 447. Simply put, Local 324 argued that the District Court had jurisdiction over the subject matter of the action pursuant to Section 301(b), and that the fee award must be vacated because it was based upon a erroneous legal conclusion.

The Ninth Circuit, erroneously believing that Local 324 was seeking to overturn this Court's decision in *Textile Workers Union*

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[7] In fact, Local 324 conceded that even if the District Court had failed to observe some procedural formality or the proceedings below were in some other way flawed, it would not fare any better than it already had (a modest sanction of $1,443.75) on a remand with instructions to follow such formalities.

v. Lincoln Mills, 353 U.S. 448 (1957), Appendix at A-5-6, concluded that this Court's holding in *American National Red Cross, supra,* only "applies specifically to 'sue and be sued' provisions in charters for federally-chartered corporations." *Id.* at A-6-7. In limiting this Court's holding to "federally-chartered corporations," the Ninth Circuit stated that Local 324 "reads too much into" this Court's two comments that "we hold that the 'sue and be sued' provision . . . suffices to confer federal jurisdiction independently of the organization's federal incorporation," 505 U.S. at 251 n.3, and that "it should be pointed out that the statutory jurisdiction in this case is not based on the Red Cross's federal incorporation, but rather on a specific statutory grant," *id.* at 264 n.16. Appendix at A-7 n.5. Rather than its "read[ing] too much" into these comments, Local 324 believes that the Ninth Circuit simply refused to follow what Local 324 believes is the plain language of this Court's holding, while fundamentally misunderstanding the holding in *Lincoln Mills.*

REASONS FOR GRANTING THE WRIT

There are three reasons why a writ of certiorari to the Ninth Circuit should issue. First, the Ninth Circuit's opinion conflicts with the plain holding of this Court in *American National Red Cross.* Second, by failing to follow this Court's holding, the Ninth Circuit has created a conflict with the Eleventh Circuit's holding in *Bartels v. Alabama Commercial College, Inc.*, 54 F.3d 702 (11th Cir. 1995). Third, the Court would settle important issues of labor and constitutional law.

A. The Conflict With This Court's Decision

In *American National Red Cross*, this Court clearly held (over a spirited dissent by Justice Scalia) that the "'sue and be sued' provision" of 36 U.S.C. § 2, when coupled with its general reference to the "Federal" courts,

> . . . confers original jurisdiction on federal courts over *all cases* to which the Red Cross is a party, with the consequence that the organization is thereby *authorized to remove* from state to federal court *any state-law action* it is defending.

505 U.S. at 248 (emphasis added).

In reaching this conclusion, this Court noted that, five years before Congress amended 36 U.S.C. § 2, it had held, in *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942), that the use of the term "sue and be sued," in conjunction with a reference to federal courts in general, conferred original jurisdiction on federal courts. *American National Red Cross,* 505 U.S. at 254. This Court then reasoned that, by specifically mentioning the "Federal" courts in conjunction with "sue and be sued" in 36 U.S.C. § 2, Congress must have intended "the provision [to] extend[] beyond a mere grant of corporate capacity to sue [and be sued], and suffices to confer federal jurisdiction." *Id.* at 257.[8]

Like the American National Red Cross, Local 324 has been "statutor[ily] grant[ed]" the power by Congress to "sue or be sued . . . in the courts of the United States." Indeed, in Section 301(b), Congress chose to use virtually the same "sue [or] be sued" language as it had used only a month earlier in 36 U.S.C. § 2, and did so while "mention[ing] the federal courts in general." *American National*

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[8] In essence, the Court held that if all Congress had intended was to give the Red Cross the general corporate power to sue and be sued as an entity, it would have simply said so without adding the general reference to "Federal" courts. However, Congress went further, and bestowed upon the Red Cross the general power to be sued *in* "Federal" courts. In Section 301(b), Congress has done the same for "labor organizations."

Red Cross, 505 U.S. at 257. Specifically, Section 301(b) provides:

> Any such labor organization [i.e., *only* one "which represents employees in an industry affecting commerce"] may *sue or be sued* as an entity and in behalf of the employees whom it represents *in the courts of the United States*.

29 U.S.C. § 185(b) (emphasis added).[9]

"The similarity of language . . . is, of course, a *strong indication* that the two statutes should be interpreted pari passu." *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973) (emphasis added). This is especially true when the "similar" statute, Section 301(b), "was enacted after" the one interpreted by this Court. *United States v. Chu*, 5 F.3d 1244, 1247 (9th Cir. 1993).

Section 301(b) is not just "similar" to 36 U.S.C. § 2; it is virtually identical. Where "[w]ords [have] a fixed legal or judicially settled meaning," they "*must* be presumed to have been used [by Congress] in that sense." *Hoffman v. Commissioner of Internal Revenue*, 978 F.2d 1139, 1145 (9th Cir. 1992) (emphasis added). In *American National Red Cross*, this Court observed that 36 U.S.C. § 2 had been enacted "five years" after its decision in *D'Oench*,

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[9] It should be noted that not all labor unions have been given the right to "sue or be sued . . . in the courts of the United States." Rather, only unions "which represent[] employees in an industry affecting commerce" enjoy this congressional grant of authority. Thus, public sector unions, whose strikes, picketing and other activities do not affect commerce and which are not regulated by federal law, and whose internal practices are not federally regulated by the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*, may not remove cases to federal court.

Duhme (wherein it gave the term "sue and be sued" "a fixed legal or judicially settled meaning" referred to in *Hoffman*). 505 U.S. at 257. Simply put, if the term, when combined with a reference to federal courts in general, had a "judicially settled meaning" on May 8, 1947 when Congress enacted 36 U.S.C. § 2 (as this Court held), then it must have had a "judicially settled meaning" little over a month later on June 23, 1947 when Congress enacted Section 301(b). *Hoffman*, 978 F.2d at 1145.

Finally, in *American National Red Cross*, this Court *repeatedly* stressed that it was *not* in any way influenced by the fact that the Red Cross was a federally-chartered corporation, but instead was relying solely upon the "sue and be sued" provision of 36 U.S.C. § 2. 505 U.S. at 251 n.3 ("[W]e hold that the 'sue and be sued' provision . . . suffices to confer federal jurisdiction independently of the organization's federal incorporation") and at 264 n.16 ("Again, it should be pointed out that the statutory jurisdiction in this case is not based on the Red Cross's federal incorporation, but rather on a specific statutory grant").

Nevertheless, the Ninth Circuit, seizing upon language in Justice Scalia's dissent (and *not* the majority opinion), concluded that this Court's holding in *American National Red Cross* must be limited to federally-chartered corporations like the Red Cross. Appendix at A-7 n.5. In doing so, the Ninth Circuit's decision clearly conflicts with this Court's decision. This Court should grant this petition to resolve the conflict.

B. The Conflict With The Eleventh Circuit

In concluding that this Court's holding in *American National Red Cross* must be limited to federally-chartered corporations like the Red Cross, the Ninth Circuit's decision is in direct conflict with the Eleventh Circuit's decision in *Bartels v. Alabama Commercial College, Inc., supra.* In *Bartels*, the Eleventh Circuit was faced with

the same issue: does this Court's holding in *American National Red Cross* apply *only* to federally-chartered corporations? However, unlike the Ninth Circuit (but like Local 324), the Eleventh Circuit concluded that it was

> . . . unable to discern any reason why *American National Red Cross*'s holdings should be limited solely to statutory "sue and be sued" clauses involving federally chartered corporation. The statutory interpretation analysis that the Supreme Court conducted in *American National Red Cross* can be straightforwardly applied to other statutes beyond the realm of federally chartered corporations.

54 F.3d at 708.

Clearly, there is now a conflict between the Ninth and Eleventh Circuits concerning the breadth of this Court's decision in *American National Red Cross*. This Court should grant this petition to resolve the conflict.

C. The Unsettled Questions of Federal Law

In its opinion, the Ninth Circuit made two comments that bear repeating here. First, the Circuit stated that it "would wreak havoc on labor litigation, greatly expand federal jurisdiction over union-related suits, and deprive state courts of exclusive jurisdiction over matters of local concern" if it were to follow this Court's decision in *American National Red Cross*. Appendix at A-9. Second, the Circuit opined that "[f]ederal courts would act outside their Article III powers if they exercised jurisdiction over suits by or against a union pursuant to § 301 absent diversity of citizenship or violation of a federal substantive right." *Id.* In making these two statements, the Ninth Circuit raised two very important issues of federal labor and constitutional law that should be, but have not

been, addressed by this Court.

In *Textile Workers Union v. Lincoln Mills, supra,* this Court first addressed the constitutionality of the provisions of Section 301 of the LMRA, including *both* Section 301(a) *and* Section 301(b). At the time, there was a split among the circuits concerning the construction and application of these two sections. *Lincoln Mills,* 353 U.S. at 450-51.

The majority view, eventually adopted by this Court, was that Section 301(a) did more than provide a federal forum to adjudicate alleged violations of collective bargaining agreements; it "authorize[d] federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Lincoln Mills,* 353 U.S. at 451. The minority view was expressed by the Fifth Circuit in both the case ultimately reviewed by this Court in *Lincoln Mills* and in *International Ladies' Garment Workers Union v. Jay-Ann Co.,* 228 F.2d 632 (5th Cir. 1956).

In *Jay-Ann Co.,* the Fifth Circuit barely touched upon Section 301(b), focusing instead on Section 301(a). The court concluded, however, that Section 301, as a whole, while "abolish[ing] some jurisdictional requisites," did not create a "federal question" claim "arising under" the laws of the United States necessary to pass constitutional muster. *Jay-Ann Co.,* 228 F.2d at 634.

In *Lincoln Mills,* this Court, as noted above, came to the opposite conclusion. Specifically, this Court concluded that Section 301(a) created just such a "federal question," such that any case alleging a violation of an agreement covered by Section 301(a) would be a case "arising under" the laws of the United States. This Court also concluded that, while Section 301(a) created the "federal question" for purposes of Article III, Section 2 of the Constitution of the United States, "Section 301(b) makes it possible for a labor

organization, representing employees in an industry affecting commerce, to sue and be sued as an entity in the federal courts." *Lincoln Mills,* 353 U.S. at 451.

Although this Court also noted that "§ 301(a) and § 301(b) supplement one another," *id.*, it left unresolved the two key issues presented in this petition. First, does Section 301(b) act *only* to "supplement" Section 301(a), such that it does not "make[] it possible for a labor organization, representing employees in an industry affecting commerce, to sue and be sued as an entity in the federal courts" on any claim other than one "arising under" Section 301(a)? *American National Red Cross* answers this question in the negative.[10]

Second, if Congress did grant such a labor organization the right to sue and be sued in federal court on purely state law claims, did Congress "expand the jurisdiction of the federal courts beyond the bounds established by" Article III, Section 2 of the Constitution? *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 491 (1983). Stated differently, did Congress, in enacting the Taft-Hartley Act in 1947 in order to regulate labor organizations and their relationships with employers in industries affecting commerce, have the constitutional authority to provide a federal forum for purely state-law causes of action involving such organizations?

The concept of federal courts adjudicating purely state-law causes of action is not a new one for this Court. For example, in *American National Red Cross,* the Court recognized that "[a]s long

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[10] Stated differently, Section 301(b) "is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over [all] cases in which" a labor organization representing employees in an industry affecting commerce is a party. *Mesa v. California,* 489 U.S. 121, 136 (1989).

ago as *Osborn* [*v. Bank of United States*, 9 Wheat 738, 6 L.Ed. 204 (1824)], this Court held that Article III's 'arising under' jurisdiction is broad enough to confer federal-court jurisdiction over [state-law] actions involving federally chartered corporations." 505 U.S. at 264. The question is, is it "broad enough to confer federal-court jurisdiction" over actions involving labor organizations that represent employees in an industry affecting commerce, at least when the action at least arguably affects federal interests?

In *Jan-Ann Co.*, the Fifth Circuit rejected the idea that it could extend what it referred to as "constructive federal-question" jurisdiction for federally chartered corporations to labor unions. *Jay-Ann Co.*, 228 F.2d at 634-35. However, in *Lincoln Mills*, the concurring opinion of Justice Burton would *not* have found that Section 301(a) created a federal law for "arising under" purposes. 353 U.S. at 460 (Burton, J., concurring). Rather, Justices Burton and Harlan (who joined in the concurring opinion) would have found that "some federal rights may necessarily be involved in a § 301 case, and hence that the constitutionality of § 301 can be upheld as a congressional grant to Federal District Courts of what has been called 'protective jurisdiction.'" *Id.*

The theory of "protective jurisdiction" or "constructive federal-question" jurisdiction (and other similar theories of Article III jurisdiction) has been discussed in a myriad of law review articles and commentaries. *See, e.g.*, Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. Rev. 895 (1996); John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis From the Perspective of Bankruptcy*, 87 Nw.U. L. Rev. 1188 (1993); Loretta Shaw, *A Comprehensive Theory of Protective Jurisdiction: The Missing "Ingredient" of "Arising Under" Jurisdiction*, 61 Fordham L. Rev. 1235 (1993); Erwin Chemerinshy & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. Rev. 67 (1990); Note, *Over-Protective Jurisdiction?: A State Sovereignty Theory of*

Federal Questions, 102 Harv. L. Rev. 1948 (1989); Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. Rev. 542 (1983); Scott A. Rosenberg, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. Rev. 933 (1982). Although, this Court has, "in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction," *Mesa v. California*, 489 U.S. 121, 137 (1989), it also has never found the need to reject the theory. *See The Decline of Federal Common Law*, 76 B.U. L. Rev. at 931 (noting that "the entire Supreme Court never has confronted the protective jurisdiction theory head on").

Simply put, the Court should grant certiorari to decide the question of whether, when Congress properly exercised its powers under Article I of the Constitution, and enacted comprehensive labor legislation regulating interstate commerce, could it allow for a federal forum to adjudicate claims in this federally regulated field in areas as to which it has not enacted substantive law? If the petition is granted, Local 324 will not argue that a labor organization can constitutionally be "authorized to remove from state to federal court *any state-law action* it is defending." *American National Red Cross*, 505 U.S. at 248 (emphasis added). Indeed, Local 324 readily concedes that "routine traffic-accident cases" to which a union may be a party, for example, present "no significant federal interest" for Article III purposes. *Mesa*, 489 U.S. at 140 (Brennan, J., concurring).

However, in a case such as this, where allegations of illegal picketing activities by a union touch *both* "interests . . . deeply rooted in local feeling and responsibility," *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), *and* a union's right of free speech, which "has long been a basic tenet of federal labor policy," *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 270 (1974), a federal interest in properly balancing these competing interests is surely present. *See Youngdahl v. Rainfair*,

Inc., 355 U.S. 131, 139 (1957) (noting that a state court is "within its discretionary power in enjoining future acts of violence," but "enter[s] the pre-empted domain of the National Labor Relations Board insofar as it enjoin[s] peaceful picketing"). This is especially true at the trial court level where, as the California Supreme Court observed, "temporary restraining orders and preliminary injunctions in labor disputes may often have the effect of determining and terminating the entire controversy." *Kaplan's Fruit & Produce Co. v. Superior Court*, 26 Cal.3d 60, 81 (1979).

CONCLUSION

In conclusion, the Court should grant this petition to correct the Ninth Circuit's conflict with this Court's decision in *American National Red Cross*, to resolve the conflict between the Ninth and Eleventh Circuits, and to resolve the important federal labor law and constitutional issues raised by the Ninth Circuit's opinion.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-56055

(Argued February 2, 1999 Decided April 14, 1999)

K.V. Mart Co. dba Top Valu Markets and Valu Plus Food Warehouses, a corporation; and Market Venture, LLC,

Plaintiffs-Appellees,

v.

United Food and Commercial Workers International Union, Local 324, Does 1 through 50, inclusive,

Defendants-Appellants.

Before:

Procter Hug, Jr., Chief Judge, James R. Browning and John T. Noonan, Jr., Circuit Judges.

Counsel:

Robert A. Cantore, Gilbert & Sackman, Los Angeles, California, for the defendants-appellants.

David A. Van Riper, Campion, Rodolff, Van Riper & Procopio, LLP, Santa Ana, California, for the

plaintiffs-appellees.

OPINION

PER CURIAM:

A labor union argues that a recent Supreme Court case requires us to reject forty years of case law interpreting § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. S 185,[1] and

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[1] Section 301, which is entitled "Suits by and against labor organizations," includes the following relevant subsections:

> (a) Venue, amount, and citizenship
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments
>
> Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. *Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States.* Any money judgment against a labor organization in a district court of the United States shall be

reinterpret the section to confer federal subject matter jurisdiction over all suits by or against a union covered by the Act. We decline to do so.

From December 1996 to February 1997, United Food and Commercial Workers International Union, Local 324 (Union), picketed a store operated by Plaintiff K.V. Mart Co. and located in a shopping center owned by Plaintiff Market Venture, L.L.C. Plaintiffs filed three successive suits in state court to enjoin or restrict the picketing. The Union removed each action to federal district court, on the novel legal theory that the "sue and be sued" clause in LMRA § 301(b) confers federal subject matter jurisdiction over any suit by or against a union covered by the LMRA. The district court concluded that § 301 confers jurisdiction only over suits for breach of contract identified in § 301(a), and remanded the cases to state court. In this, the third remand order, the district court awarded Plaintiffs attorneys' fees and costs pursuant to 28 U.S.C. § 1447(c), on the ground that the Union did not have a reasonable basis for removal in light of the two prior remand orders. The Union appeals, contending the district court erred in concluding it lacked subject matter jurisdiction.

I

We have jurisdiction to review the district court's fee award under the collateral order exception to the final judgment rule. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (orders

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> enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

29 U.S.C. § 185(a), (b) (emphasis added). The union bases its argument on the emphasized language of § 301(b).

issued before final judgment are appealable under § 1291 as collateral orders if they "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment"). The order appealed in this case (1) conclusively determines that the Union must pay Plaintiffs' attorneys' fees incurred in challenging the removal; (2) resolves an important issue completely separate from the merits of the action -- whether the removal was improper; and (3) is effectively unreviewable on appeal from the final judgment of the state court after remand because the state appellate court would have no jurisdiction to review the federal district court order. *Cf. Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 713-14 (1996) (holding remand order on abstention grounds, which is not rendered unreviewable by 28 U.S.C. § 1447(d), is a collateral order reviewable pursuant to § 1291).[2]

II

Although the remand order itself is not reviewable, *see* 28 U.S.C. § 1447(d), an award of attorneys' fees and costs for improper

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[2] Plaintiffs, citing *Hill v. MacMillan/McGraw-Hill Sch. Co.*, 102 F.3d 422 (9th Cir. 1996), and *Kordich v. Marine Clerks Ass'n*, 715 F.2d 1392 (9th Cir. 1983), argue that we lack jurisdiction to review the fee award. In *Hill* and *Kordich*, this court held that orders imposing sanctions did not fall within the collateral order doctrine. *See Hill*, 102 F.3d at 423-25; *Kordich*, 715 F.2d at 1393 (relying on *Johnny Pflocks, Inc. v. Firestone Tire & Rubber Co.*, 634 F.2d 1215 (9th Cir. 1980), which held that an order imposing discovery sanctions was not an appealable interlocutory order because it could be reviewed after entry of final judgment, *id.* at 1216). Those cases, however, were pending in federal court. Therefore, the sanctions orders were reviewable on appeal from final judgment.

removal is reviewed for abuse of discretion. *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). A district court abuses its discretion if it relies "'on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Id.* (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). The Union argues the district court committed legal error when it held the removal was improper, because the district court erred when it held the "sue and be sued" clause in § 301(b) did not confer subject matter jurisdiction.

More than forty years ago, the Supreme Court ruled that § 301(b) did not create subject matter jurisdiction, but merely established that unions subject to the LMRA could sue and be sued in federal court. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).[3] Several lower courts have expressly held that § 301(b)

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[3] [I]t is apparent that § 301(a) and § 301(b) supplement one another. Section 301(b) makes it possible for a labor organization . . . to sue and be sued as an entity in the federal courts. Section 301(b) in other words provides the procedural remedy lacking at common law. Section 301(a) certainly does something more than that. Plainly, it supplies the basis upon which the federal district courts may take jurisdiction and apply the procedural rule of § 301(b).

Lincoln Mills, 353 U.S. at 451-52; see also *Wooddell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 98 (1991) ("a suit properly brought under § 301 must be a suit either for a violation of a contract between an employer and a labor organization [covered by the Act] or for violation of a contract between such labor organizations"; that is, the suit must fall within the grant of subject matter jurisdiction in § 301(a)).

is not a source of subject matter jurisdiction.[4]

The Union argues that these holdings are no longer good law in light of the more recent Supreme Court decision, *American Nat'l Red Cross v. S.G.*, 505 U.S. 247 (1992). The Court held in *Red Cross* that a "sue and be sued" provision in the federal charter for the American National Red Cross conferred federal subject matter jurisdiction over all suits by or against the organization. *Id.* at 257. The Court ruled that Congress must have intended the provision to have that effect, in light of the then-judicially-settled meaning of such "sue and be sued" clauses in charters of federally-chartered corporations. *Id.* at 255 (case law at the time "support[ed] the rule that a congressional charter's `sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts"). Because the LMRA was enacted at about the same time as the Red Cross charter and § 301(b) uses "sue and be sued" language that would be deemed jurisdictional under the *Red Cross* rule, the Union argues that *Red Cross* requires us to reinterpret § 301(b) as creating subject matter jurisdiction.

The Court's holding in *Red Cross* applies specifically to "sue and be sued" provisions in charters for federally-chartered

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[4] *See Rock Drilling Local Union No. 17 v. Mason & Hanger Co., Inc.*, 217 F.2d 687, 691-93 (2d Cir. 1954); *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F.2d 183, 187-88 (4th Cir. 1948); *Publix Supermarkets, Inc. v. United Food & Commercial Workers Int'l Union*, 900 F. Supp. 419, 420-21 (M.D. Fla. 1995) (although decided after *American Nat'l Red Cross v. S.G.*, 505 U.S. 247 (1992), opinion does not discuss *Red Cross*); *Kayser-Roth Hosiery Co., Inc. v. Textile Workers Union*, 285 F. Supp. 484, 488 (E.D. Tenn. 1968); *Murphy v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 102 F. Supp. 488, 492 (E.D. Mich. 1952).

corporations.[5] The LMRA is a comprehensive statutory scheme regulating national labor relations. Unions subject to the LMRA are

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[5] *See Red Cross*, 505 U.S. at 255 ("a *congressional charter's `sue and be sued' provision* may be read to confer federal court jurisdiction if . . ."") (emphasis added); *id.* at 265 (Scalia, J., dissenting) ("The Court today concludes that whenever a statute granting a *federally chartered corporation* the `power to sue and be sued' specifically mentions the federal courts . . . ."") (emphasis added); *see also id.* at 258-59 (comparing "sue and be sued" provisions in Red Cross charter with charters for other federally-chartered corporations). The Union argues that two comments in *Red Cross* footnotes indicate that the Red Cross holding is not limited to "sue and be sued" clauses in charters of federally-chartered corporations. *See id.* at 251 n.3, 264 n.16. The Union reads too much into these comments, which simply state that the Court did not rely on the Red Cross's status as a federally-chartered corporation as a source of jurisdiction, but on the inclusion of the "sue and be sued" clause in the charter.

In *Bartels v. Alabama Commercial College, Inc.*, 54 F.3d 702, 708-09 (11th Cir. 1995), the Eleventh Circuit found no "reason why *American Nat'l Red Cross's* holdings should be limited solely to statutory `sue and be sued' clauses involving federally chartered corporations," and held that a "sue and be sued" clause in the Higher Education Act conferred federal subject matter jurisdiction over suits by and against the Secretary of Education regarding the Act. It may be that, absent evidence to the contrary, Congress's use of language that the Supreme Court had earlier found created jurisdiction in the context of federal charters could demonstrate Congressional intent to create federal jurisdiction in other contexts. In this case, however, there is substantial evidence indicating a contrary Congressional intent and the Supreme Court has held that § 301(b) is not jurisdictional.

not comparable to federally-chartered corporations. They are subject to some regulation by the federal government, but that is true of most American institutions. Federally-chartered corporations, in contrast, are entirely defined by federal law. *Osborn v. Bank of United States,* 22 U.S. (9 Wheat.) 738, 823 (1824).

Red Cross does not undermine *Lincoln Mills sub silentio. Red Cross* is premised on Congressional intent. Indications of Congress's intent in enacting § 301, other than the wording of the "sue and be sued" clause, support the *Lincoln Mills* holding that the section confers jurisdiction only over the contract disputes identified in § 301(a). The legislative history demonstrates that Congress enacted § 301 to make unions liable for breaches of collective bargaining agreements.[6] *See Lincoln Mills,* 353 U.S. at 453 ("Both the Senate Report and the House Report indicate a primary concern that unions as well as employees should be bound to collective bargaining contracts."). Other jurisdictional provisions of the LMRA would be superfluous if § 301(b) conferred subject matter jurisdiction over all suits by or against unions. See *Rock Drilling,* 217 F.2d at 692 (§ 301(a) would be superfluous); *Amazon Cotton,* 167 F.2d at 188 (§ 301(a) and § 303(b), 29 U.S.C. § 187, would be

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[6] See H.R. Rep. No. 80-245, at 6 (item #18) (1947), *reprinted in* 1NLRB, Legislative History of the Labor Management Relations Act, 1947 [hereinafter Leg. His.], at 297 (1985); *id.* at 8, *reprinted in* 1 Leg. His. at 299; *id.* at 45-46 (discussing S 302, which was ultimately enacted as S 301), *reprinted in* 1 Leg. His. at 336-37; H.R. Min. Rep. No. 80-245, at 108-10 (1947), *reprinted in* 1 Leg. His. at 399-401; S. Rep. No. 80-105, at 15-18 (1947), *reprinted in* 1 Leg. His. at 421-24. The Union quotes statements from these Congressional reports out of context to create the impression that Congress intended to generally confer jurisdiction over suits by or against unions. Read in context, however, the statements clearly refer to § 301(a) jurisdiction to enforce union contracts.

superfluous); *id.* at 186-87 (§10 and §208, 29 U.S.C. § 160 and § 178, respectively, would be superfluous). "Under accepted canons of statutory interpretation, [the court] must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991).

Federal courts would act outside their Article III powers if they exercised jurisdiction over suits by or against a union pursuant to § 301 absent diversity of citizenship or violation of a federal substantive right. *See Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158, 164 (9th Cir. 1950) (stating federal jurisdiction over § 301(a) suits would be unconstitutional if the subsection did not establish a substantive federal right); *see also Lincoln Mills*, 353 U.S. at 456-57 (holding that § 301(a) establishes a federal substantive right); *cf. Osborn*, 22 U.S. (9 Wheat.) at 823, 827 (holding actions by or against federally-chartered corporations, which are entirely defined by federal law, "arise under" federal law).

Finally, reinterpreting § 301(b) would wreak havoc on labor litigation, greatly expand federal jurisdiction over union-related suits, and deprive state courts of exclusive jurisdiction over matters of local concern. There is no indication in the legislative history that Congress intended such an extensive revision of federal jurisdiction.

We conclude that § 301(b) does not confer subject matter jurisdiction over all suits by or against unions covered by the LMRA. The district court correctly concluded that it lacked subject matter jurisdiction and did not abuse its discretion in awarding fees and costs to Plaintiffs for improper removal.

AFFIRMED.

OPINION AND ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

K.V. MART COMPANY, dba TOP VALU MARKETS and VALU PLUS FOOD WAREHOUSES, a corporation; and MARKET VENTURE, LLC,

Plaintiffs,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 324, and DOES 1 through 50, inclusive,

Defendants.

ORDER REMANDING ACTION TO STATE COURT AND GRANTING PLAINTIFFS' REQUEST FOR ATTORNEY'S FEES AND COSTS

I.

INTRODUCTION

Plaintiffs K.V. Mart Company, dba Top Valu Markets, Valu Plus Food Warehouses, and Market Venture, LLC, filed a complaint in Los Angeles County Superior Court on February 5, 1997, seeking injunctive relief and damages against defendant United Food and Commercial Workers International Union arising from defendant's alleged mass picketing of plaintiffs' store. In response to plaintiffs' application for a temporary restraining order, defendant r oved this action to federal court on February 6, 1997, alleging federal

jurisdiction under section 301(b) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185.

Upon review of the removal petition and plaintiffs' complaint, the Court, on February 27, 1997, issued an Order to Show Cause Why the Action Should Not Be Remanded to State Court ("OSC") for lack of subject matter jurisdiction. Defendant responded to the OSC on March 7, 1997. Plaintiffs filed a response on March 17, 1997, requesting attorney fees. Defendant filed a response to plaintiffs' reply on March 20, 1997. After full consideration of the parties' responses to the OSC, the Court finds that it lacks subject matter jurisdiction and **REMANDS** this action to the Los Angeles County Superior Court. Plaintiffs' request for attorney fees, incurred as a result of defendant's improper removal, is granted in part.

II.
FACTUAL BACKGROUND

Plaintiffs operate a Valu Plus food warehouse in Lynwood, California ("Lynwood Store"). In their complaint, plaintiffs allege that just after the grand opening of the Lynwood Store on December 5, 1996, and continuing at least through the time this complaint was filed in Superior Court, defendant engaged in mass picketing of the Lynwood Store as part of its effort to negotiate a labor contract with plaintiffs. Plaintiffs allege that during the course of the picketing, defendant harassed employees and customers of the Lynwood Store, frightened and intimidated them, and blocked their ingress and egress to the store. Plaintiffs seek damages and injunctive relief to stop the disruptive tactics.

This is the third action involving virtually identical allegations between plaintiffs and defendant. The two previous actions were summarily remanded to state court for lack of jurisdiction. See K.V. Mart Co. v. UFCW Local 324, CV 95-6482

WJR (VAPx); K.V. Mart Co. v. UFCW Local 324, CV 96-1883 GHK (Shx).

III.
JURISDICTION UNDER THE LMRA

A removing defendant has the burden of establishing that the court has subject-matter jurisdiction over the action. See William W. Schwarzer, A. Wallace Tashima, and James M. Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial § 2:609 (The Rutter Group 1997). Section 301(a) of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). In determining the scope of federal jurisdiction conferred by § 301, the Supreme Court has held:

> [A] suit properly brought under § 301 must be a suit either for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce or for violation of a contract between such labor organizations.

Woodell v. Intern. Broth. of Elect. Workers, 502 U.S. 93, 98 (1991). Thus, in order for the Court to have jurisdiction under § 301, there must be a dispute over a contract between a labor union and an

employer, or between two or more labor unions. As the defendant concedes, there is no labor contract dispute involved in this case. Rather, as the complaint alleges, defendant is seeking to negotiate a collective bargaining agreement with plaintiffs.

Defendant contends that the Court has jurisdiction based on the "sue or be sued" language of § 301(b) of the LMRA. Section 301(b) provides:

> Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States . . . .

This argument, however, has been rejected repeatedly by the courts. In 1948 shortly after the enactment of § 301, the Fourth Circuit unequivocally held that § 301(b) did not constitute a separate grant of federal court jurisdiction:

> Contention is made that jurisdiction is vested in the District Court by section 301(b) of the act, 29 U.S.C.A. § 185(b), providing that a labor organization may sue or be sued in the courts of the United States 'as an entity and in behalf of the employees whom it represents'; but the purpose and effect of this provisions was manifestly to make clear the capacity of labor organizations to come or be brought into court as parties . . . not to enlarge the class of cases of which the District Courts were given jurisdiction. The difference between such a provision and one conferring jurisdiction is well

> illustrated by comparison of 301(b) of the act with 301(a), the latter of which confers on the District Courts jurisdiction of suits between employers and labor organizations for violation of contracts . . . There would, of course, have been no reason for the enactment of either section 301(a) or section 303(b), if the effect of section 301(b) was to vest in the federal courts general jurisdiction of suits by or against labor unions.

Amazon Cotton Mill Co. v. Textile Workers Union of Am., 167 F.2d 183, 187-88 (4th Cir. 1948)(emphasis added); accord Rock Drilling v. Mason & Hanger Co., Inc., 217 F.2d 687 (2d Cir. 1954) ("the portion of Section 301(b) relied upon by plaintiff is a capacity statute pure and simple and goes no further."); See also, Squire D Co. v. United Elec. Radio & Mach. Workers of Am., 123 F. Supp.. 776, 781-82 (E.D. Mi. 1954); Murphy v. Hotel & Restaurant Employees, 102 F. Supp.. 488, 492 (E.D. Mi. 1951).

Defendant relies on the Supreme Court's holding in American National Red Cross v. S.G. and A.E., 505 U.S. 247 (1992), where the "sue and be sued" language of the Red Cross' Congressional charter was found to confer subject-matter jurisdiction on federal courts. Despite defendant's elaborate argument, that case does not lead to the conclusion that the "sue or be sued" language in section 301(b) provides an independent basis for federal court jurisdiction. American National Red Cross dealt with "sue and be sued" language the context of a congressionally charged non-profit corporation. The LMRA, on the other hand, is a complex federal statutory scheme that grants exclusive federal court jurisdiction over disputes involving collective bargaining agreements or disputes between labor organizations. The "sue and be sued" language in section 301(b) simply recognizes the right of a labor organization, like defendant, to sue or be sued in federal court. In the context of this statutory scheme, this clause does not

constitute a grant of subject matter jurisdiction in the federal courts where a labor union is merely a party to the action.

Although the Supreme Court has not directly addresses the argument advanced by defendant, the Court has held that § 301(a) and 301 (b) must be read together:

> From the face of the Act it is apparent that § 301(a) and § 301(b) supplement one another. Section 301(b) makes it possible for a labor organization, representing employees in an industry affecting commerce, to sue and be sued as an entity in the federal courts. Section 301(b) in other words provides the procedural remedy lacking at common law. Section 301(a) certainly does something more than that. Plainly, it supplies the basis ***452** upon which the federal district courts may take jurisdiction and apply the procedural rule of § 301(b).

Textile Workers Union of Am. v. Lincoln Mills of Ala., 352 U.S. 448, 450, 77 S.Ct. 912, 914 (1957); see also, Pub. Supermarkets, Inc., v. United Food and Commercial Workers Int'l Union, AFL-CIO & CLL, 900 F. Supp.. 419, 420 (M.D. Fla. 1995) (recognizing that § 301(b) "must be read within the context of the entire subsection").

In sum, § 301(a) grants jurisdiction to the federal courts while § 301(b) is a procedural or capacity provision that recognizes the right of a labor organization to sue or be sued. Here, it is clear from the complaint and the parties' briefs that this action does not involve a dispute between a labor union and employer over an existing contract, nor does it involve a dispute between labor unions. Accordingly, the Court does not have subject-matter jurisdiction under § 301(a) of the LMRA.

IV.
ATTORNEY FEES

Plaintiffs seek an award of attorney fees and costs for the expense incurred in responding to the Court's OSC, and in drafting a motion to remand that they intended to file before the Court issued its OSC.

28 U.S.C. § 1447 provides that a district court may, in its discretion, award attorney fees and costs incurred as a result of an improper removal. "The statute imposes no requirement that the Court first make a finding of bad faith, frivolous or vexatious removal, or lack of an objectively reasonable basis for removal." Juliano v. Phoenix Communications, Inc., 1994 WL 721676 (N.D. Cal. 1994) (citing Moore v. Permanente Medical Group, Inc., 981 F. 2d 443, 446-448 (9th Cir. 1992)). The decision of whether to award costs and fees lies within the sound discretion of the district court with due consideration of the particular circumstances of the case and the legal issues involved. See Juliano, 1994 WL 721576 (citing Zandi-Dulabi v. Pac. Retirement Plans, Inc., 828 F. Supp. 760, 764 (N.D. Cal. 1993)).

This case never belonged in federal court. On two previous occasions, this defendant removed virtually identical cases to federal court. On both occasions, the district court remanded the action to state court. Defendant certainly knew that this case was not properly removable to federal court. Thus, plaintiffs are entitled to their reasonable attorney fees and costs incurred as a result of defendant's improper removal.

Plaintiffs request attorney's fees in the amount of $4,083.75. Initially, plaintiffs expended time preparing a motion to remand, but that motion was never filed because of the Court's OSC. Plaintiffs' request includes $1,443.75 for time spent researching and drafting the motion to remand and the reply to the Court's OSC (8.25 hours

at $175 per hour), $350 for a court appearance on the OSC, $2,170 for time spent drafting the temporary restraining order and related appearance in state court, and $120 in costs for having to appear in federal court.

Plaintiffs' request of $1,443.75 for time spent preparing a motion to remand and the response to the Court's OSC is reasonable, as is plaintiffs' request of $120 for costs. The Court, however, declines to award plaintiffs attorney's fees for the time spent seeking a temporary restraining order from the state court. Moreover, plaintiffs were not required to appear at a hearing on the Court's OSC. Thus, plaintiffs are entitled to recover $1,443.75 in reasonable attorney's fees and costs incurred as a result of defendant's improper removal.

V.
CONCLUSION

For the foregoing reasons, it is hereby ordered that:

1. This action is **REMANDED** to the Los Angeles County Superior Court as this Court lacks subject-matter jurisdiction;

2. Plaintiffs are awarded $1,443.75 in reasonable attorney's fees as a result of defendant's improper removal;

3. The Clerk of the Court shall serve a certified copy of this order on the Clerk of the Los Angeles Superior Court.

IT IS SO ORDERED.

DATED: June 24, 1997.

Richard A. Paez
United States District Judge

Labor Management Relations Act, 1947

Section 301, 29 U.S.C. § 185

Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Supreme Court, U.S.
FILED
AUG 13 1999
OFFICE OF THE CLERK

No. 99-96

In The

Supreme Court of the United States

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 324, AFL-CIO, CLC,

Petitioner,

-against-

K.V. MART COMPANY d/b/a TOP VALU MARKETS and VALU PLUS FOOD WAREHOUSES, a corporation; and MARKET VENTURE, LLC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court abused its discretion by awarding One Thousand Four Hundred Forty Three Dollars and Seventy Five Cents ($1,443.75) in attorneys' fees to Respondents pursuant to 28 U.S.C. §1447(c) and 29 U.S.C. §185 when the Petitioner removed a third and identical matter to federal court after two prior remand orders?

PARTIES

Petitioner: United Food and Commercial Workers Union, Local 324, AFL-CIO, CLC.

Respondents: K.V. MART COMPANY d/b/a TOP VALU MARKETS and VALU PLUS FOOD WAREHOUSES, a corporation; and MARKET VENTURE, LLC.

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RELIEF REQUESTED

Respondents respectfully request that this Court deny the United Food and Commercial Workers Union, Local No. 324, AFL-CIO, CLC's Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit was rendered on April 14, 1999, and is reported at 173 F.3d 1221; 161 LRRM 2001. The opinion affirms the Order of the United States District Court for the Central District of California, which was filed on June 24, 1997, and was unpublished.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

1. Rule 10 of the Rules of the Supreme Court of the United States provides in relevant part:

> A petition for a writ of certiorari will only be granted for compelling reasons. The following . . . indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with

the decision of another United States court of appeals on the same important matter; . . . (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court . . .

2. 28 U.S.C. §1447(c) states:

" . . . If at any time before final judgment, it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State Court. The State court may thereupon proceed with such case."

3. 28 U.S.C. §1447(d) states:

"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to §1443 of this title shall be reviewable by appeal or otherwise."

4. Section 301(a) and 301(b) of the Labor Management Relations Act, 1947 ("§301(b)"), 29 U.S.C. §185(a) and (b) provide in relevant part:

"Suits by and against labor organization.

(a) Venue, amount and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.

Any labor organization which represents employees in any industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and on behalf of the employees whom it represents in the courts of the United States . . . "

STATEMENT OF THE CASE

From December, 1996, to February, 1997, the United Food and Commercial Workers International Union, Local 324 ("Local 324" or "Petitioner") picketed Respondent K.V. Mart Company's food warehouse in Lynwood, California ("Lynwood store") located in a shopping center owned by Respondent Market Venture, L.L.C. (collectively "Respondents"). Just after the grand opening of the

Lynwood Store on December 5, 1996, Petitioner engaged in mass picketing of the Lynwood Store as part of its effort to negotiate a labor contract with K.V. Mart. During the course of the picketing, Petitioner harassed employees and customers of the Lynwood Store, frightened and intimidated them, and blocked their entrance and exit to the store. Therefore, damages and injunctive relief were sought by Respondents to stop Local 324's tactics.

Respondents filed three successive suits against Local 324 in state court to enjoin or restrict unlawful picketing occurring at Respondent's Lynwood store and at other store locations. Before each hearing on the preliminary injunction, Local 324 removed each action to federal district court on the theory that the "may sue and be sued" clause contained in §301(b) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. §185 ("LMRA"), confers original federal subject matter jurisdiction over *any suit* by or against a union – whether or not the matter involves a purely state law cause of action. Petitioner concedes in its Petition that Respondents' "cause of action" arises exclusively under state law that has not been preempted by any federal law.

In *each* of the three actions, the district court concluded that §301 confers jurisdiction *only* over suits for *breach of a union contract or collective bargaining agreement*, as set forth in §301(a), and remanded the cases to state court. In the third remand order, the district court awarded Respondents attorneys' fees and costs pursuant to 28 U.S.C. §1447(c), on the ground that Local 324 did not have a reasonable basis for removal in light of the two prior remand orders. Local 324 appealed the sanctions

order to the Ninth Circuit Court of Appeals, which affirmed the District Court's Order.

SUMMARY OF ARGUMENT

Local 324 misstates the question presented for review and Respondents, therefore, file this opposition to object to and correct a misstatement of fact and law that bears on what issues properly would be before the Court if certiorari is granted.

The sole issue presented for review is whether the district court abused its discretion by awarding one thousand four hundred forty-three dollars and seventy five cents ($1,443.75) in attorneys' fees to Respondents pursuant to 28 U.S.C. §1447(c) and 29 U.S.C. §185 in light of the two prior remand orders? The issue on review is *not* whether the District Court properly remanded the case to state court based upon lack of subject matter jurisdiction.

In fact, although it is undisputed by the parties that a remand order is not appealable, Local 324 has manipulated its appeal of the sanctions award in an attempt to overturn 40 years of case law in favor of a decision holding that LMRA §301(b) confers subject matter jurisdiction over suits brought by or against a union.[1]

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[1] Although Local 324 argued to the District Court and the Ninth Circuit Court of Appeals that LMRA § 301(b) conferred jurisdiction over *any* suit, it has now revised this theory. It now claims that § 301(b) confers jurisdiction only over cases where picketing and free speech are involved or where the cause of action touches "some basic tenet of federal labor policy." Thus,

Respondents submit that the District Court was within its discretion in awarding sanctions of attorneys' fees against Local 324 because, as Local 324 has fully admitted in its Petition, the sanctions were awarded only after the District Court had found on two prior, almost identical, occasions that the District Court lacked subject matter jurisdiction in these actions. On each occasion, the Petitioner's argument for federal subject matter jurisdiction was based on an argument repeatedly rejected by the courts. Nevertheless, Petitioner knowingly proceeded with its removal in an obvious and substantial waste of not only the court's time, but also in an obvious means to delay Respondents' attempts at obtaining an injunction and forcing Respondents to expend unnecessary attorneys' fees and costs. It is important to note that Local 324 does not dispute the amount of the fee award; nor does it argue that sanctions are not warranted in this situation. Rather, Petitioner focuses on whether the district court had subject matter jurisdiction over this matter – a clear attempt to appeal the remand order.

Petitioner ignores the simple fact that on each and every occasion of attempted removal, the subject actions did "not involve a dispute between a labor union and employer over an existing contract;" nor did "they involve a dispute between labor unions." Therefore, according to §301(b) of the Labor Management Relations Act, 1947, 29 U.S.C. §185(b) (hereinafter "§301" or "29 U.S.C. §185(b)") the federal court did not have subject

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it concedes that "traffic cases," for example, would not properly be brought in federal court.

matter jurisdiction, and twice decided against such removal.

In view of Petitioner's unconscionable bad faith tactics, conducted in the face of the Court's two (2) prior orders, Respondents justifiably sought their costs and expenses, including attorneys' fees, incurred as a result of the attempted third removal. The district court justifiably and properly used its discretion and awarded a portion of the requested amount as sanctions against the Petitioner.

ARGUMENTS AND AUTHORITIES

In summary, the district court did not abuse its discretion in awarding sanctions where Petitioner removed this case, along with the prior identical actions, for a third time after the court had twice decided against such removal.

A. PETITIONER MISSTATES THE ISSUES IN THE UNDERLYING APPEAL.

As stated above – and as Petitioner freely admits in its Petition – Petitioner has used the sanctions order to obtain review of the District Court's decision to remand the case to state court. However, it is well settled that review of the underlying remand order is barred as it is not a final order. 28 U.S.C. §1447(d) (1982); *Peabody v. Maud Van Cortland Hill Schroll Trust*, 892 F.2d 722, 773 (9th Cir. 1989).

Local 324's petition, therefore, sets forth no compelling reasons why the petition for writ of certiorari should be granted. Petitioner has failed to set forth a conflict

between courts of appeals on the same important matter, to set forth a conflict between state courts of last resort on an important federal question, or to show that a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Since none of these considerations apply here, the petition for writ of certiorari should be denied.

B. PETITIONER'S THIRD REMOVAL REGARDING THE SAME ISSUE BETWEEN THE SAME PARTIES SHOWED THE REQUISITE BAD FAITH TO WARRANT SANCTIONS.

A party filing an improper notice of removal may be sanctioned under either Rule 11 of the Rules of the Supreme Court of the United States or 28 U.S.C. §1447. *Ballard's Service Center, Inc. v. Transue*, 865 F.2d 447, 449 (1st Cir. 1989). Federal courts have inherent equitable powers to assess attorneys' fees as sanctions against a party whose litigation conduct is found to be "vexatious" or in "bad faith." *See, Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-767, 100 S.Ct. 2455, 2464 (1980). (*See also, Peabody v. Maud Van Cortland Hill Schroll Trust, supra*, 892 F.2d at 776 – second removal after prior remand and no intervening changes in case subjected Defendant to sanctions.)

Title 28, §1447(c) further provides, in pertinent part: *An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a*

result of the removal (emphasis added). *See, Pollard & Picket v. Dwight*, 8 U.S. 421, 2 L.Ed. 666 (1808). (On award of just costs, *see, Pack v. Rich Terminal Co.*, 502 F.Supp. 58 (1980) and *Alaska v. General Ins. Co.*, 826 F.Supp. 309 (1993)).

An award of attorneys' fees and costs for improper removal is reviewed for abuse of discretion. *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992).

As stated above, review of the underlying remand order is barred because it is not a final order. 28 U.S.C. §1447(d) (1982); *Peabody v. Maud Van Cortland Hill Schroll Trust, supra*, 892 F.2d at 773. However, Local 324 argues that sanctions against it were not warranted because their petition for removal was properly supported by federal law. "Where, as here, a [party] is sanctioned for being frivolous, effective review of the sanctions requires examination of the moving party's 'good faith belief in the merit of a legal argument.' " *Id.* at 774-775, citing *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-831 (9th Cir. 1986).

In *Peabody*, the Ninth Circuit noted that it is a fine line walking between review of the underlying sanctions order and the remand order. The Court stated,

> "This fine line is not one we need to walk in the context of this case because we find the arguments [Defendant] made in the . . . Petition for Removal had been rejected previously by the district court. A second presentation of the same, previously rejected theory to the same court fairly defines 'frivolous.' Unless [Defendant] can show some relevant change subsequent to the first remand, the sanctions award was proper."

Repeated applications for removal have been held improvident in various situations. For instance, removal is improper if based on a federal claim that is already pending before the court in a different action. *Walton v. UTV of San Francisco*, 776 F.Supp. 1399 (1991). In *Walton*, removal was held to be improper where it would lead to "an endless series of filings and removals defeating both the Court's determination of its supplemental jurisdiction and the State court's ability to deal with the claims before them." *Id.*

Here, the situation is substantially similar to that decided by the Ninth Circuit in *Peabody*. Local 324 removed two previous cases to federal court which involved identical factual and legal issues. Each time, Petitioner argued that the court had subject matter jurisdiction under LMRA §301(b), and each time, Respondent's motion to remand was granted. Yet, even after its argument was twice rejected, Local 324 *again* removed a *third*, identical case to federal court, setting forth the exact same argument that had been previously rejected by the same court.

As the District Court stated in its order, "On two previous occasions, this Petitioner removed virtually identical cases to federal court." On both occasions, the district court remanded the action to state court. Petitioner certainly knew that this case was not properly removable to federal court. Despite Petitioner's attempt to disguise the matter otherwise, the blatant refusal to recognize the two prior remand orders was itself proper grounds, and within the discretion of the district court to justify the award of sanctions. By the third attempt at removal, Local 324 could not have harbored a good faith

belief that its third removal was any more proper than the first two. As stated by the Ninth Circuit, such conduct *"defines 'frivolous' "* and sanctions are awardable.

The underlying policy consideration of *Walton, supra,* also warrants close examination of the pattern of conduct exhibited by Local 324. A state court must be able to deal with claims before it. The series of improvident removals that promises to continue if not deterred, renders the state court's power to issue temporary restraining orders useless, both in the expected twenty-one (21) day duration, as well as for a precursor to a preliminary injunction. The "endless series of filings and removals" warned against in *Walton, supra,* has already occurred between these parties. The district court agreed that the conduct was in bad faith, especially in light of the outcome of the two (2) previous suits. Such misuse of the removal statute rendered the State court impotent to deal with the claims before it.

Because the narrow issue presented is whether the District Court properly awarded sanctions for frivolous removal – and the answer is clearly "yes!" – the question of whether LMRA §301(b) grants subject matter jurisdiction is not properly before this court on an appeal from an award of attorneys' fees and costs. Therefore, Local 324's petition should be denied.

C. PETITIONER'S REMOVAL IN THIS CASE WAS GROSSLY IMPROPER

Assuming, *arguendo,* that the Court does find that it must consider LMRA §301(b) to decide whether to grant

Local 324's petition for a writ of certiorari, then Respondents call the Court's attention to Title 28 §1447(c) which provides, in pertinent part:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. *See, Pollard & Picket v. Dwight,* (1808) 8 U.S. 421, 2 L.Ed. 666.

As discussed above, the remedies outlined in Title 28 §1447(c) are appropriate in this instance as to Petitioner's conduct of improper removal of this action.

In support of removal, Petitioner relies primarily on §301 of the *Labor Management Relations Act* (29 U.S.C. §185) which provides, in pertinent part:

> Subpart (a) – *Suits for violation of contracts* between an employer and a labor organization . . . *may* be brought in any district court . . . Subpart (b) – Any such labor organization . . . *may sue or be sued . . . in the courts of the United States.*

However, as the district court has noted on three occasions, the instant case does not concern any union contract or any collective bargaining agreement. Petitioner admits this point. Consequently, subpart (a), on its face, is not applicable to the set of facts at hand. However, Local 324 tries to read into §301(b) a requirement that any cause of action touching "some basic tenet of federal labor policy" must be filed in federal court – even though a contract is not involved.

In *Kayser-Roth Hosiery Co., Inc., Dayton Div. v. Textile Workers Union of America AFL-CIO, et al.,* 285 F.Supp. 484

(1968), the court, in considering a virtually identical factual situation, made the following observation:

> In the present lawsuit it is clear that no contract or collective bargaining agreement is involved under the allegations of the Complaint. It is likewise clear that if jurisdiction is dependent upon subsection (a), the action must be a suit "for violation of contract." Upon a diligent search of the cases the Court is unable to uncover a single case, wherein jurisdiction was solely predicated upon *29 U.S.C. §185*, that did not involve an allegation of a contract or a collective bargaining agreement as the basis of the lawsuit. *Id.* at 486.

Similarly, the court, citing *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337, 339-340 (6th Cir. 1967), continued:

> Section 301 of the Labor Management Relations Act, 29 U.S.C., §185, confers jurisdiction upon the District Court without regard to diversity of citizenship or jurisdictional amount to enforce *collective bargaining agreements* in industries affecting interstate commerce (emphasis in original). *Id.* at 487.

Finally, the court concluded:

> Absent an allegation of some contract or agreement between the parties, this Court would not have jurisdiction under 29 U.S.C. §185. Section 301 does not give the federal courts power to hear a controversy just because a "labor dispute" exists nor because of the identity of one of the parties as a "labor organization." *Id.* at 488.

Since there has been no allegation that the parties to this lawsuit have entered into a contract or collective

bargaining agreement, 29 U.S.C. §185 is simply not implicated, despite Petitioner's status as a labor union. *See also, Publix Supermarkets Inc. v. United Food and Commercial Workers Int'l Union*, 900 F.Supp. 419 (M.D. Florida 1995), citing *Woodell v. International Brotherhood of Electrical Workers, Local 71*, 502 U.S. 93, 98, 112 S.Ct. 494, 498 116 L.Ed.2d 419 (1991).

Petitioner appears to espouse the view that subparts (a) and (b) of §185 somehow operate in the disjunctive, i.e., that satisfaction of either subpart will confer this Court with original jurisdiction of this matter. Petitioner, hence, relies solely on subpart (b), i.e., "[Local 324] *may sue or be sued* as an entity . . . in the courts of the United States." 29 U.S.C. §185(b). However, the Supreme Court stated in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 at 451-452, 77 S.Ct. 912 at 915, 1 L.Ed.2d 972 (1957), that this contention is without merit. The Supreme Court held the sections are *conjunctive* as follows:

> From the face of the Act it is apparent that §301(a) and §301(b) [29 U.S.C. §185(a) and 29 U.S.C. §185(b)] supplement one another. Section 301(b) makes it possible for a labor organization . . . to sue or be sued in the federal courts. Section 301(b) in other words provides the procedural remedy lacking at common law. Section 301(a) certainly does something more than that. Plainly, it supplies the basis upon which the federal district courts may take jurisdiction and apply the procedural rule of §301(b). *Id.*

Therefore, Petitioner cannot circumvent the requirement of 29 U.S.C. §185(a) that requires, at a minimum, an allegation of some contract or collective bargaining

agreement, *the jurisdictional requirement*, which is not present in this case. By contending only that as a labor organization it can sue or be sued in the United States, *the procedural remedy*, Petitioner falls far shy of meeting the standard for proper removal.

With respect to subpart (b), the "may sue and be sued" language, Petitioner also misapplies its chief authority to effect removal of this action as within the original jurisdiction of the district court. In *American National Red Cross v. S.G. and A.E.*, 505 U.S. 247, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992), the Supreme Court held certain "sue or be sued" language contained in the Red Cross' charter, 36 U.S.C. §2, "confers original jurisdiction on federal courts over all [state law] cases to which the Red Cross is a party." Petitioner contends that the "sue or be sued" language in 29 U.S.C. §185(b) "is virtually identical" to 36 U.S.C. §2, and thus, this district court has original jurisdiction over the present state law action. Nevertheless, the "sue or be sued" language is different in the case at hand, and is expressly distinguished as not having the same jurisdiction conferring power as that used in the Red Cross charter:

> The cases support the rule that a congressional charter's "sue and be sued" provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts. *American National Red Cross v. S.G. and A.E.*, (1992) 505 U.S. 247, 112 S.Ct. 2465 at 2471, 120 L.Ed.2d 201.

In that case, the "sue or be sued" provision read as follows:

> [Red Cross is authorized] to sue and be sued in courts of law and equity, *State or Federal*, within the jurisdiction of the United States (emphasis added.) *Id.*

Of marked importance is the court's own explanation, by way of example, of the degree of specificity required for a jurisdictional grant. The following "sue or be sued" provisions do not confer federal court jurisdiction, but operate as a "mere grant . . . of the normal corporate capacity to sue":

5. [T]o sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever. *Bank of the United States v. Deveaux*, (1809) 5 Cranch 61, 3 L.Ed. 38.

6. [T]o sue and be sued, plead and be pleaded, defend and be defended, in all courts of law and equity within the United States. *Bankers Trust Co. v. Texas and Pacific R. Co.*, (1916) 241 U.S. 295, 36 S.Ct. 569, 60 L.Ed. 1010.

The following provisions, however, do confer federal court jurisdiction as there is an express grant of jurisdiction:

7. [T]o sue and be sued in courts of law and equity, State or **Federal**, within the jurisdiction of the United States. *American National Red Cross v. S.G. and A.E.*, (1992) 505 U.S. 247, 112 S.Ct. 2465 at 2471, 120 L.Ed. 201.

8. [T]o sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in **any circuit court** of the United States. *Osborn v. Bank of the* ____

United States, (1824) 9 Wheat. 738, 6 L.Ed. 204.

9. [To sue or be sued] in any court of law or equity, State or **Federal**. *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, (1942) 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956.

In sum, where there is a failure to mention the courts of the union, an express federal reference, the provision will be held merely to give a general capacity to sue, but not a right to sue, in federal court.

In the final analysis, the language of 29 U.S.C. §185(b) is virtually identical to the language used in *Bankers Trust Co. v. Texas and Pacific R. Co.*, 241 U.S. 295, 36 S.Ct. 569, 60 L.Ed. 1010 (1916), number "2" above, not *American National Red Cross v. S.G. and A.E.*, 505 U.S. 247, 112 S.Ct. 2465 at 2471, 120 L.Ed. 201 (1992), and the result should be the same. "In the Courts of the United States" simply does not contain the required language for a grant of original federal court jurisdiction.

CONCLUSION

For all of the foregoing reasons, in the interest of justice, Respondents respectfully request that Local 324's Petition for a Writ of Certiorari be denied; or in the alternative, that the Ninth Circuit Court of Appeals' decision be affirmed and that Respondents be awarded their reasonable attorneys' fees and costs herein.

Respectfully submitted

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